LATCHMAN SINGH & SONS

v.

TAN KIAN

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[CIVIL APPEAL NO. 12-3-89]
26 MARCH 1990

LEGAL PROFESSION: *Notice of appearance - Rule of conduct only - Rule 56 Legal Profession (Practice and Etiquette) Rules 1978.*

CIVIL PROCEDURE: *Setting aside default judgment - Extension of time - Principles to be followed - Different approaches of costs to different applications - Oversight by party or his solicitor - O. 18 r. 8(1) Rules of the High Court 1980.*

On 14 May 1984 as a result of the absence of the appellant L and his Counsel in Court when the case was called, judgment was entered for the plaintiff T under O. 28 r. 6 of the Rules of the High Court 1980 (RHC); it was later discovered that L's application to set aside the default judgment was made outside the relevant time (5 months from date of judgment). After hearing L's application for extension of time, the President of the Sessions Court dismissed it on 18 December 1984; concluding that due to the negative outcome of the first application, there was no need to consider the merits of L's case. L appeals firstly on the basis that the President was wrong in refusing to extend time and secondly that the President should have considered the merits of L's case.

L had initially asked the Legal Aid Bureau (LAB) to mention this case on 14 May 1984; at a later occasion he asked V to mention on his behalf on 25 May 1984. V did not do so. There was dispute as to whether L made enquiries from certain staff of the LAB. MJ, a representative of the LAB, in his affidavit, denied the allegations.

Held:

[1] The facts relating to conversations which L or his staff had with the LAB and V's enquiries from the Court are clearly hearsay and did not require a formal rebuttal by individual affidavits.

[2a] If L had intended to dispute the claim, instead of requesting LAB to mention on his behalf he should have requested LAB to state to the Court in accordance with O. 14 r. 5(2) of the Subordinate Court Rules 1980 (the Rules) and obtain a date within which he has to serve on the LAB a defence.

[2b] On the facts L had failed to account satisfactorily for his absence on 25 April 1984 and 14 May 1984.

[3] Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978, which relates to notice of appearance, is only a rule of conduct and not a rule of law; it cannot therefore act as an estoppel (to prevent one party from obtaining the judgment, even if that party had notice of the appearance filed).

[4a] Although it is more practical and convenient for the President to have considered both the applications to set aside and extension of time, it was not illegal for him to do so separately. Different considerations apply to these applications.

[4b] The Courts adopt a much stricter attitude in relation to applications for extension of time and the Courts invariably insist on cogent and acceptable reasons for not complying with the Rules of Court. A party's or his solicitor's oversight or mistake of facts or law were never tolerated by the Courts.

[5a] Looking at the wording of O. 13 r. 8 and O. 19 r. 9 in the Rules of the High Court 1980 as against O. 28 r. 8(1) Subordinate Court Rules 1980 (SCR), the former orders give a wider discretion to the Court to vary or set aside its own orders on just terms; the latter order imposes an imperative time limit within which the application must be made.

[5b] Under O. 28 r. 8(1) of the SCR the applicant must primarily satisfy the Court that he has good reasons for not acting within the prescribed time before proceeding to establish the other two requirements.

[6] The plea of *res judicata* will not apply as the discontinuance or withdrawal of any action before any argument or decision is no bar to subsequent action being filed.

[7] The entire defence is a mere denial of T's allegation without any reference to L's own version of the accident or in which aspect T's allegations were untrue; a mere mention in the statement of defence or affidavit by Counsel that a defendant has a good defence is not evidence of a *prima facie* defence within the meaning of the principle laid down in *Evans v. Bartlam*.

[Appeal dismissed.]

Cases referred to:
Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 CLJ (Rep) 32
Tang Chok Ching v. Wong Ik Tieng & Ors. [1973] 2 MLJ 25
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23
Ratnam v. Cumarasamy & Anor. [1965] 31 MLJ 228
Cheah Teong Tat v. Ho Gee Seng & Ors. [1974] 1 MLJ 31
Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58
Ben Huat Seng Co. Ltd. v. Lee Poh Soo [1967] 1 MLJ 145
The Kronprinz [1887] 12 AC 262
Seng Huat Hong Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1986] 1 MLJ 348
Phillip Securities (Pte.) v. Wong Ah Heng [1987] CLJ (Rep) 830
Evans v. Bartlam [1937] AC 473
Gan Kim Kiat & Bros. Realty Sdn. Bhd. v. Leang Ah Kan [1983] CLJ (Rep) 558

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, r. 56
Rules of the High Court 1980, O. 13 r. 8
Subordinate Courts Rules 1980, O. 3 r. 5, O. 13 r. 8, O. 14 r. 5(2), O. 19 r. 9, O. 28 rr. 6, 8(1), (2)

For the appellant - Charanjit Singh; M/s. C.S. Saini & Associates
For the respondent - Santha; M/s. Seelan & Santha

JUDGMENT

Wan Yahya J:

On 14 May 1984 when this case was called up in the Sessions Court Kelang, both the appellant and his Counsel were absent and judgment was entered in favour of the plaintiff under O. 28 r. 6 of the Subordinate Courts Rules 1980 (the Rules).

During his subsequent application to set aside that judgment in default made on 27 July 1984, it was discovered that the appellant did not file his application within the time period of 14 days as required under O. 28 r. 8(2) of the Rules. So the President ruled that an application to that effect must be first considered. Thus he heard the application for the extension of time and dismissed it on 18 December 1984 and concluded that due to the negative outcome of this first application, he need not consider the merits of the appellants' case.

In the affidavit filed and considered by the President, the appellant stated that on receiving instructions he had spoken on 11 May 1984 to one En. Ramli from the Legal Aid Bureau who agreed to mention the case on 14 May 1984 on his behalf. Subsequently on enquiry made by his staff, one Miss Peggy, she was informed by one Miss Onn from the Legal Aid Bureau that the next date for mention was to be on 25 May 1984. According to appellant instead of appearing in the case he had instructed one Mr. Velan to mention the case on his behalf. However Mr. Velan did not attend Court on 25 May 1984 and when he did subsequently (no date mentioned) enquire from the Court, Mr. Velan was told that judgment had been entered and that the assessment of damages was held on 25th.

The learned President noted that on the facts averted in the appellant's affidavit alone, it was apparent that the appellant was aware that judgment had been entered on 25th and yet he had waited until 18 December 1984 i.e. a lapse of about five and half months (or 5 months after the expiry of the period specified under O. 28 r. 8(2)) before making an application for extension of time. For this reason he dismissed the application.

Before the Court, two issues were taken up against the learned President's judgment. Firstly it was alleged that he was wrong in refusing to extend time. Secondly he should have considered the merits of the applicant's case.

Re-extension of Time

The substance of the argument before me by Mr. Charanjit Singh was that the judgment was irregular for three reasons. Firstly he contends impliedly that he was outwitted or ensnared by Legal Aid Bureau's unfairly taking judgment on 14 May 1984 and misleading him further into believing that his case would be coming up for mention again on 25 May 1984; and that if there was at all any fault for not turning up on that date, it was due to Mr. Velan's faulty memory rather than his mistake. As the learned President was silent on this point, I took the liberty to examine the affidavits. The former serious allegations by the appellant was denied by Mr. Michael Joseph of the Legal Aid Bureau in his affidavit dated 25 October 1984 in which he disposed that no telephone calls were received by both En. Ramli or Miss Oon. Mr. Charanjit submits that I should not consider this denial as both these officers did not personally refute the allegation by way of affidavits. With respects, Mr. Charanjit probably forgot that, likewise, his own allegation about Miss Peggy talking to Miss

Oon and Mr. Velan's enquiry from the Court was not substantiated by any affidavit from either Miss Peggy, Mr. Velan or the Court staff with whom Mr. Velan learnt about the judgment. The facts relating to Miss Peggy, Miss Oon and Mr. Velan are clearly hearsay and did not require a formal rebuttal by individual affidavits. Moreover if Counsel did not agree with the contents of Mr. Michael Joseph's affidavit, he should have challenged the fact by applying to cross examine the deponent - which unfortunately he did not. Counsel next argued that if his staff had not spoken to Miss Oon, he would not have possibly known about the next date for hearing i.e. 25 May. I am not persuaded by this reasoning as ringing up Legal Aid Bureau was by no means the only source for him to obtain information about his case. He could, as was done by Mr. Velan, have contacted the Courts. Even if we accept that Mr. Charanjit did contact Encik Ramli before 14 May, it is nevertheless incredible that he should be merely asking the Legal Aid Bureau to mention on his behalf as he must have known that by O. 28 r. 6 the Court was bound to give judgment in default of his appearance and his defence. If he had intended to dispute the claim, surely he would have requested the Legal Aid Bureau to state so to the Courts in accordance with O. 14 r. 5(2) of the Rules and obtain a date within which he has to serve on the Legal Aid Bureau a defence. Counsel must have known that failure to comply with this procedure would result in the judgment being given under O. 14 r. 5(2). In spite of these, Counsel's affidavit merely states he asked Legal Aid Bureau to get another mention date without disclosing whether he was disputing the claim or enquiring the date within which the Court had ordered him to file his defence.

For his second ground on irregularity, Counsel took exception to the Legal Aid Bureau's attitude towards obtaining judgment inspite of their awareness of the appellant's notice of appearance. He cited r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978. In reply the Legal Aid Bureau explained they were unaware of the notice of appearance until much later as the appellant had sent the same to the Bureau without any covering letter or reference. In any event, r. 56 is only a rule of conduct and not a rule of law and therefore cannot act as an estoppel to prevent one party from obtaining the judgment, even if that party had notice of the appearance filed.

For these reasons I would hold, as the learned President must have likewise held that the respondent's version was the more probable version of the two and consequently the judgment on 14 May 1984 was regularly obtained.

The next objection taken against the learned President's judgment is on his failure, at the hearing of the application to attend time, to contemporaneously consider the defence on the merits. It is to be noted here that judgment was entered on 14 May 1984, and the application to set aside was made on 27 July 1984 i.e. almost 2½ months after judgment and the application to extend time was only made on 18 December 1984 i.e. about 6 months after the date of judgment. At that hearing the learned President noted in his notes of evidence that he would initially decide on the application to extend time.

Counsel for appellant submitted that he was wrong in doing so and he cited several authorities in support.

In my opinion although it is more practical and convenient for the learned President

to have considered both applications together, it was nevertheless not illegal for him to do so separately. Non compliance with O. 28 r. 8(2) entails an application for an extension of time. Such application comes under O. 3 r. 5 of the Subordinate Courts Rules. Different considerations apply to an application to extend time and one to set aside judgment. In the latter type of application, the appellant need only give some explanation for his absence followed by a defence on merits or sometimes referred to as an arguable case. Various past decisions of the Courts indicate that Judges applied moderate tests in accepting the explanation for a party's non-attendance. However, in the former category of application to extend time, the Courts adopted a much stricter attitude and invariably insist on cogent and acceptable reasons for not complying with the Rules of Court. A party's or his solicitor's oversight or mistake of facts or law were never tolerated by the Courts. A typical illustration of this presumption can be seen in the authorities on extension of time to file a notice of appeal.

The mainstay of the appellant's argument is based on a passage in the Supreme Court judgment of *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 CLJ (Rep) 32 at 33 in which Lee Hun Hoe CJ (Borneo) said:

> We are unable to agree with the reasoning of the learned Judge. First, where an application is made for setting aside a judgment in default the learned Judge would have to consider the merits of the case.

That case is however distinguishable from our present case. *Fira Development's* case refers to an application to set aside judgment under O. 13 r. 8 of the Rules of High Court. So is the case of *Tang Chok Ching v. Wong Ik Tieng & Ors.* [1973] 2 MLJ 25 and likewise in *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23, as cited by appellants' Counsel. However in this present appeal we are dealing with an application under O. 28 r. 8(1) and (2) of the Subordinate Court Rules which is differently worded. For the purpose of easy comparison, I reproduce the relevant parts of O. 13 r. 8 and O. 19 r. 9 which is identically worded as O. 13 and O. 28 r. 8(1) of the Subordinate Courts Rules

> Order 13 r. 8 &
> Order 19 r. 9 - The Court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of the Order.
>
> Order 28 r. 8 (1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule must be made within 14 days after the hearing.

It is discernible from the above orders that whereas the Orders in the High Court Rules give a wider discretion to the Court to vary or set aside its own orders on just terms. O.28 r. 8(2) of the Subordinate Courts Rules imposed an imperative time limit within which the application must be made.

My reading of the above orders is that in an application under O. 13 r. 8 or O. 19 r. 9 of the High Court Rules, the applicant has to satisfy the Court by firstly explaining the reason for his absence or his failure to file his defence within the time prescribed and secondly that he has a defence on merits. But in an application under the Subordinate Courts Rules, the applicant must primarily satisfy the Court

that he has good reasons for not acting within the prescribed time before proceeding to establish the other two requirements.

In this case the appellant was well aware of the returnable date of the summons but he made no effort to file his defence. Even if we were to accept that he had yet to identify the particulars of his defence at that time there was nothing to prevent him from attending and explaining to the Court his alleged predicament instead of merely instructing the Bureau to mention the case on his behalf. Furthermore the fact that an application to extend time was made on 18 December 1984 i.e. about 4 months after the application to set aside the judgment (i.e. on 27 May 1984) is strongly suggestive of Counsel's oversight or misappreciation of the law and both do not constitute good reason for allowing the application - see:

> *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228; *Cheah Teong Tat v. Ho Gee Seng & Ors.* [1974] 1 MLJ 31; *Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58; *Ben Huat Seng Co. Ltd. v. Lee Poh Soo* [1967] 1 MLJ 145 [1974] 1 MLJ 58.

I would therefore hold that the learned President had exercised correctly his discretion in disallowing the application to extend time.

In the event that this line of reasoning is wrong, I have taken the opportunity to look further into the records. The appellant's contention on this issue rests on the existence of a previous case filed by the respondent which had been withdrawn with no order as to costs. However, the plea of *res judicata* will not apply as the discontinuance or withdrawal of an action before any argument or decision is no bar to subsequent action being filed - see *The Kronprinz* [1887] 12 App. Cases 262 at 265. As for the defence on merits, the appellant merely stated in para. 14 of his affidavit affirmed on 29 August 1983:

> I verily believe that the defendants have a good defence on the merits in view of paras. 7, 8 & 9 of the draft copy of the tentative defence which the defendants may file reflecting the merits is annexed herewith and marked as Exhibit 'C'.

Paragraph 7 which is the last para. of the tentative defence however reads:

In the premises the defendants pray that the plaintiffs claim be dismissed. There is no para. 8 or 9 in the defence. In any event the entire defence is a mere denial of the respondent's allegation without any reference to the appellant's own version of the accident or in which aspect the respondent's allegation were untrue. In *Seng Huat Hong Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1986] 1 MLJ 348 and *Phillip Securities (Pte.) v. Wong Ah Heng* [1987] CLJ (Rep) 830, both Edgar Joseph Jr. J and M. Shankar J held that a mere mention in the statement of defence or affidavit by Counsel that the defendant has a good defence is not evidence of a *prima facie* defence within the meaning of the principle laid down in *Evans v. Bartlam* [1937] AC 473. However, in so far as the observation on the unheavy burden expected from an applicant in an application under O. 28 r. 2, Edgar Joseph Jr. J was obviously referring to the burden of explaining the applicant's absence in Court rather than his delay in filing his application within the specified time. It is apparent from p. 349 para. H (left) that the application was made six days after the judgment i.e. well within the 14 days of the prescribed period. Similarly in *Gan Kim Kiat & Bros. Realty Sdn. Bhd. v. Leang Ah Kan* [1983] CLJ (Rep) 558 which was referred to in

Seng Huat's case, Peh Swee Chin J was dealing with the applicant's reasons for being absent and not for failure to file the application within the required time.

On reading the affidavits, the grounds of decisions, the entire records and for reasons expressed earlier, I find that:

(a) The judgment was regularly obtained.

(b) The learned President had correctly exercised his discretion in refusing to extend time.

(c) The appellant had failed to account satisfactorily for his absence on 14 May 1984 and on 25 April 1984.

(d) The appellant had failed to show both in the affidavits filed in this Court and in the Court below any defence on merits.

I therefore dismissed this appeal with costs

Also found at [1991] 1 CLJ 128